



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA**  
**(BIMA TOWERS)**  
**CAUSE NO. 206 OF 2013**

**ISAIAH MAKHOHA**

**CLAIMANT**

**v**

**BASCO PRODUCTS (K) LTD**

**RESPONDENT**

**JUDGMENT**

1. Isaiah Makhoha (Claimant) initially filed a Memorandum of Claim on 16 July 2013 against Basco Paints (K) Ltd (Respondent). On 12 March 2014 with leave of Court an Amended Memorandum of Claim was admitted and the issue in dispute was stated as *terminal dues, salary in lieu of notice, salary arrears and compensation*. (Respondent did not object as the amendment related only to the change of name from Basco Paints (K) Ltd to Basco Products (K) Ltd.
2. The Respondent had filed its Response on 30 October 2013.

**Claimant's case**

3. The Claimant pleaded that he was employed by the Respondent as a loader in May 2011 and that on 14 February 2013 his services were terminated without any notice, being given an opportunity to be heard or reasonable cause and in contravention of the law.
4. The Claimant therefore seeks a declaration that the termination was unfair/unlawful, twelve months compensation, salary in lieu of notice, leave pay and salary arrears totalling Kshs 182,400/- and a certificate of service.
5. In testimony, the Claimant stated that at the time of hearing he was working with Grain Bulk Handlers Ltd. Prior to termination, the Claimant was employed by the Respondent as a casual on 5 May 2011 and in August 2011 he was placed on a 3 month contract, which got renewed severally for 3 months until termination on 14 February 2013.
6. During the tenure of employment the Claimant informed the Court that he would be paid by the month (at time of termination he was earning Kshs 12,000/- monthly) and was getting pay slips (produced) and that he never went on leave. He was also working overtime upto 6.00 pm but not getting paid. For February 2013 he received only Kshs 6,000/-.
7. Under cross examination, the Claimant stated that his last contract was from 15 November 2012 to 14 February 2013 (contracts attached to Response). He also confirmed that at the end of each 3 month contract he would be paid in lieu of leave and leave allowance (vouchers attached to Response) as well as overtime (indicated in pay slips). He was also a contributor to the National

- Social Security Fund.
8. The Claimant further admitted taking a loan of Kshs 5,000/- from the Respondent which was deducted from his January and February 2013 wages.
  9. In re-examination the Claimant stated that his contract provided for termination by the giving of 7 days notice.

### **Respondent's case**

10. The Respondent informed the Court that it would rely on the Response and documents filed. Rule 21 of the Industrial Court (Procedure) Rules, 2010 allow the Court to determine a suit on the basis of pleadings, affidavits, documents filed and submissions made by the parties. Because the Claimant did not raise any objections, the Court will consider the Response and documents filed by the Respondent.
11. The Respondent's case was that the Claimant was on 3 month renewable contracts and the last contract expired on 14 February 2013 and the same was not renewed due to low volume of business. At the end of the contract the final dues of the Claimant were calculated and paid to him (documents attached).
12. The Respondent further pleaded that unfair termination cannot apply to a fixed term contract which expires and is not renewed where there is no automatic renewal clause. It was also pleaded that the Claimant was not terminated and that fixed term contracts are recognised by the Employment Act.
13. On the reliefs sought by the Claimant the Respondent pleaded that since the contract expired, pay in lieu of notice was not payable, that the Respondent deducted a salary advance/loan taken by the Claimant in his final dues and that accrued leave was paid at end of each contract.

### **Issues for determination**

14. Broadly two issues arise for determination and these are whether failure to renew a fixed term contract may amount to unfair termination and whether the Claimant has made out a case for any of the reliefs sought.

### ***Whether failure to renew a fixed term contract may amount to unfair termination***

15. It cannot be disputed that the relationship between the Claimant and the Respondent was governed by written contracts of 3 month durations each. The last such contract was dated 15 November 2012 and clause 4 thereof provided the duration as 15 November 2012 to 14 February 2013.
16. The copy of this last contract exhibited by the Respondent did not have page 2. Whether this was by design or inadvertent mistake is not clear and to assign a reason without more, the Court would be speculating. But what is clear is that the previous contracts exhibited had clause(s) 9 which provided for termination by the giving of not less than 30 days notice in writing by either party during the contract period.
17. These contract(s) exhibited had no provision for giving notice of intention to renew or not renew. And the Court was not shown and has not found any contractual or statutory obligation placed upon the Respondent to notify the Claimant that the contract was expiring through effluxion of time on 14 February 2013.
18. Fixed term contracts are recognised and envisaged by the Employment Act under the definition of 'contract of service' and sections 9(1)(a), 10(2)(e) and 37. In actual fact even the so called *permanent contracts* with a retirement age are for a definite period and therefore are fixed term contracts.
19. The Claimant has not demonstrated any reasonable legitimate expectation that the contract would be renewed or that it was aimed at a more permanent duration.
20. The legal position in Kenya is unlike the position obtaining in South Africa where section 186(b) of the Labour Relations Act has formally subjected the non renewal of a fixed term contract to challenge under the unfair dismissal regime.
21. In my humble view, under the current statutory framework obtaining in Kenya, the non renewal of a fixed term contract with no clause on (automatic) renewal cannot and does not fall under or

amount to unfair termination/wrongful dismissal.

22.The Respondent had the discretion to renew or not to renew. Different considerations may apply where a case is presented as one of unfair labour practice as opposed to unfair termination/wrongful dismissal, but that discussion must await a suitable case.

### **Final dues**

#### ***One month salary in lieu of notice***

23.In view of the conclusion reached on unfair termination and that the contract expired by effluxion of time, this relief is declined.

#### ***Leave for 2 years***

24.In examination in chief the Claimant testified that he never went on leave but under cross examination he admitted that he would be paid cash in lieu of leave. This is confirmed in appendices 10, 11, 12 and 13 which were signed by the Claimant.

25.Respondent's appendix 7(a) indicates the Claimant was paid Kshs 536/- in lieu of accrued leave for the last contract. This relief also fails.

#### ***Salary arrears for February 2013***

26.The Claimant sought under this head Kshs 2,400/-. He worked until 14 February 2013 and the wages for the period was calculated as Kshs 6,008/-. After deductions he acknowledged receipt of the balance of the money as part of final dues. This relief is also dismissed.

27.Before concluding the Court notes with regret that none of the parties complied with directions as to the filing of submissions as directed by the Court. The Claimant was expected to file and serve his submissions on or before 25 March 2014 but filed it on 26 March 2014 while the submissions by the Respondent which should have been filed on or before 1 April 2014 were filed on 8 April 2014.

28.The submissions by the Claimant and the Respondent and authorities cited have been considered although not referred to in the discussion hereinabove.

### **Conclusion and Orders**

29.From the foregoing, the Cause must fail and the Memorandum of Claim filed in Court on 16 July 2013 is dismissed with no order as to costs.

**Delivered, dated and signed in open Court in Mombasa on this 16<sup>th</sup> day of May 2014.**

**Radido Stephen**

**Judge**

**Appearances**

Mr. Odhiambo instructed by Odhiambo S.E & Co. Advocates for Claimant

Mr. Molenje, Senior Legal Officer, Federation of Kenya Employers for Respondent